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MAY 25 2004

OPEN RECORDS DIVISION

Geoffrey S. Connor
Secretary of State

May 21, 2004

FILE # ML-43725-04
I.D. # 43725

The Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Attn.: Missy Cary

VIA CERTIFIED MAIL - RETURN RECEIPT REQUESTED

RQ-0231-GA

RE: REQUEST FOR LEGAL OPINION RELATED TO TEXAS OPEN MEETINGS ACT

Dear General Abbott:

In accordance with TEX. GOV'T. CODE §§ 402.041 – 402.045, the Office of the Secretary of State ("SOS") hereby seeks the formal legal opinion of the Office of the Attorney General ("OAG") concerning the applicability of TEX. GOV'T. CODE, Chapter 551, the Texas Open Meetings Act (hereinafter referred to as "TOMA"), to examinations conducted and advisory reports prepared by voting system examiners (the "Examiners") conducted in accordance with TEX. ELEC. CODE, Chapter 122 (collectively referred to herein as the "Voting System Laws").

Following a meeting in our office on April 14, 2004 with certain members of Consumers Union, a non-profit association, we received a letter on April 28, 2004 from Consumers Union setting forth their belief that the examinations conducted and reports submitted by the Examiners should be subject to TOMA. Consumer's Union requested, alternatively, that if our office did not subject the Examiners to TOMA, that we seek a formal legal opinion from the OAG on the matter. A copy of the April 28, 2004 letter from Consumer's Union is enclosed for your convenience.

SOS respectfully disagrees with the legal analysis and conclusions contained in Consumers Union letter regarding whether the Examiners are subject to TOMA. Quite simply, the members of the Legislature that created the Voting System Laws did not intend, and the actual language contained in Voting Systems Laws cannot reasonably be and has not been construed to provide, that the Examiners are subject to TOMA.

Background of Voting Systems Laws in Texas

TEX. ELEC. CODE, Chapter 122, is divided into four separate subchapters: Subchapter A, *Voting System Standards*; Subchapter B, *Approval of System and Equipment*; Subchapter C, *Modification in Design of Approved System or Equipment*; and Subchapter D, *Reexamination of Voting System or Equipment*. For purposes of convenience, please note that subchapters B-D each contemplate appointment of, and examination by, Examiners such as the ones at issue here.

SOS will not discuss the various roles of the Examiners (under subchapters B-D) separately because the operative provisions are the same for each: (a) designation by the SOS and the OAG;¹ (b) reports by each Examiner following examination;² and (c) ultimate, definitive approval or disapproval by SOS.³ For the sake of convenience, this letter will cite to subchapter B with the understanding that its provisions are representative of the other subchapters.

Chapter 122 of the Texas Election Code

A. Generally

The procedures and requirements of TEX. ELEC. CODE, Chapter 122, are relatively straightforward. The minimum standards for voting systems are set forth in Subchapter A generally, and sections 122.001 and 122.0011 in particular. It is worth noting that, even in Subchapter A, the Legislature made clear that the ultimate authority to approve or disapprove of any particular voting system rested squarely with the Secretary of State ("Secretary"). TEX. ELEC. CODE § 122.002 (secretary may inspect voting system for compliance at any time including the day of an election). This unambiguous authority is repeated in section 122.031, which provides:

(a) Before a voting system or voting system equipment may be used in an election, the system and a unit of the equipment must be approved by the secretary of state as provided by this subchapter.

The subchapter in turn apparently places no limitation on the Secretary's approval authority. Indeed, the subchapter authorizes the Secretary to adopt more specific requirements and standards than those general ones provided in Subchapter A.⁴ In short, if another person had authority to approve, not approve or otherwise modify the criteria for acceptance of voting systems, the Secretary's standards would be rendered essentially meaningless.

B. Appointment of, and Scope of Review by, Examiners

The only possible source of confusion about the character of the Secretary's approval would be the provisions that authorize the appointment of Examiners. *See* TEX. ELEC. CODE §122.035 (authorizing appointment of examiners). The Examiners, however, exercise no authority over the approval or disapproval of the voting systems; nor, in fact, do they exercise any sovereign functions of government. Their involvement consists only of the following:

¹Please note, however, that in the context of examinations related to a modification of equipment, the provision is made for Examiners only if SOS requires an independent examination. From there, however, the provisions seem largely identical to all other provisions calling for Examiners. *See* TEX. ELEC. CODE §§ 122.035, 122.067 and 122.092 (each calling for appointments by SOS and OAG, and providing substantially the same limitations on Examiner qualification).

²TEX. ELEC. CODE §§ 122.036, 122.068, 122.093.

³Tex. Elec. Code §§ 122.031, 122.061, 122.091, 122.095.

⁴Additional requirements have been adopted in 25 TAC Chapter 81, Subchapter D.

(a) The examiners shall examine the voting system or voting system equipment for which an application has been submitted at the time *and in the manner directed by the secretary of state*.

(b) After conducting the examination, each examiner shall prepare a written report on the examination *as directed by the secretary* and deliver the report to the secretary.

TEX. ELEC. CODE § 122.036 (emphasis added). The individual Examiners neither deliberate, nor do they make any collective determination; they simply examine and report in an advisory capacity on an individual basis. The lone authority for making a determination about whether any particular voting system may be approved is left entirely to the discretion of the Secretary:

(a) After reviewing the examiners' reports, *the secretary of state shall determine* whether the voting system or voting system equipment for which an application has been submitted satisfies the applicable requirements for approval.

(b) *The secretary may examine* the system or equipment to aid in determining whether it satisfies the requirements for approval.

(c) If the system or equipment satisfies the applicable requirements for approval,⁵ the secretary by written order shall approve the system or equipment of that design for use in elections. Otherwise, the secretary shall deny the application.

TEX. ELEC. CODE § 122.038 (emphasis added).

Examiners' Reviews and Reports

SOS schedules three periods a year for voting systems examinations. By administrative rule, these periods have been set for January, May, and September. 1 TEX. ADMIN. CODE §81.60(4) (Vernon 2004). Two to three days are set aside in each period for the examinations. One exam is held in the morning and one in the afternoon as necessary. Voting system vendors are required to submit to SOS four copies of relevant software and source codes, along with six copies of any user and/or reference manuals. *Id.* §81.60(2). The vendor must also submit to SOS six copies of the summary report(s) from a Nationally Recognized Test Laboratory (NRTL), declaring that the item meets the Federal Election Commission's minimum voting system requirements prior to the certification examination by the Examiners. *Id.* These materials are forwarded to the Examiners for their review and copies are retained by SOS for its records.

⁵Again, although the Examiners are inspecting the systems for compliance with applicable requirements, ultimate decision-making authority is vested in the Secretary. Furthermore, some of the requirements may actually be imposed by the Secretary. Such authority would be meaningless if some other entity were given the authority to determine compliance therewith.

The examinations are scheduled for two to three hours and are videotaped as required by administrative rule. 1 TEX. ADMIN. CODE §81.60 (8) (Vernon 2004). Generally, an examination is conducted as follows: the vendor begins by introducing the voting system or identifying changes to a previously certified voting system. The vendor is required to present the system in the examination as it will be used in an election. For example, if reporting software is being submitted for certification, the vendor must include equipment to allow the Examiners to cast votes, transfer the votes to the reporting software, and produce election reports. There is no set guideline or script for the examination; each Examiner is permitted to question the vendor on matters that interest or concern that particular Examiner, including matters that contain proprietary information concerning the vendor's software application that is otherwise confidential by law. See TEX. ELEC. CODE ANN. § 122.0331(d) (Vernon 2003). No Examiner chairs the examination or has authority over the other Examiners, and there are no quorum requirements. SOS employees are present to advise the Examiners on the applicable provisions of the Voting Systems Laws, and other provisions of the Texas Election Code, and to review each system's compliance with standards on unassisted voting by persons with disabilities, which are contained in Section 81.57 of the Administrative Code. 1 TEX. ADMIN. CODE §81.57 (Vernon 2004). While the Examiners generally discuss any problems they might uncover with a system with its vendors and amongst themselves, there is no formal voting process by which the Examiners, as a collective body, express their approval or disapproval of a system during the examination.

Each Examiner is required to submit a written report within 30 days of the examination. *Id.* §81.60(9). Generally, if the advisory reports are unanimously opposed to certification, the Secretary denies certification. If the advisory reports unanimously recommend certification of a particular system, or if there is a split opinion among the Examiners, Secretary carefully reviews the reports to determine whether or not the voting system should be certified, whether a condition should be attached to certification, or whether the certification should be denied. The Examiners are known to have different strengths (and in fact the Legislature contemplated such differing strengths by requiring certain areas of expertise for Examiners) and the advisory reports are reviewed with this in mind. In addition to reviewing Examiners' advisory reports, Secretary may also choose, and has in the past chosen, to review the vendor's submitted materials. Comments from political subdivisions that use a submitted system may also be taken into account.

The Secretary also has authority to informally certify modifications to previously certified voting systems if he determines that the changes are minor and do not warrant review by all the Examiners. TEX. ELEC. CODE ANN. §122.064 (Vernon 2003). The vendor initiates this process by submitting the request for approval of the modification in writing with a thorough description of the changes. The request is usually forwarded to the SOS-employee voting system examiner and one other examiner with a request that they review the materials and advise on whether the change is minor enough to be approved or whether it should be submitted for a full examination by the remaining Examiners.

Because SOS is subject to the Texas Open Records Act set forth in TEX. GOV'T CODE, Chapter 552 ("TORA"), all records concerning certification examinations are open to the public for review at any time in accordance with TORA. All applications for voting system certification, Examiner advisory reports, and the actual certification of voting systems by the Secretary are "open records." Indeed, on various occasions following a written request pursuant to TORA, SOS has provided voluminous written materials regarding the certification process. While program source code and all other software on file with SOS are not public information under Section 122.0331(d) of the Election Code, they are available to OAG in investigations of election irregularities or to a court or tribunal in a judicial proceeding. TEX. ELEC. CODE ANN. §122.0331(d) (Vernon 2003). In addition, SOS has a section of its website set aside particularly for information related to the certification process.⁶

Legal Analysis of TOMA

A. *Statutory Considerations*

1. *Applicable Law*

TOMA provides in relevant part that "[e]very regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter." TEX. GOV'T CODE § 551.002. To fall within the ambit of the chapter, then, an entity must be a governmental body. "Governmental body" is defined in TEX. GOV'T CODE §551.001 as:

(A) a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members;

(B) a county commissioners court in the state;

(C) a municipal governing body in the state;

(D) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;

(E) a school district board of trustees;

(F) a county board of school trustees;

(G) a county board of education;

(H) the governing board of a special district created by law;

(I) a local workforce development board created under Section 2308.253;

⁶ Please see <http://www.sos.state.tx.us/elections/laws/cclerklaws.shtml>

(J) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and

(K) a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code.

2. Analysis

Clearly, the only definition of "governmental body" that the Examiners could even arguably meet is found in subsection (A). That is to say, the Examiners will qualify as a "governmental body" if they are found to be: "a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members...."

Given the clear language of the Voting Systems Laws, and the manner in which individual Examiners conduct themselves during the course of a voting system examination, there is no reasonable basis to conclude that the Examiners are, or reasonably should be, subject to TOMA. The Legislature did not use the words "board, commission, department, committee, or agency" in describing the Examiners. Moreover, there is no cohesive, unified body associated with the Examiners. The Voting Systems Laws treat each Examiner solely as an individual.

Even more compelling is the absence of any formalized process or procedure contained in the authorizing legislation for purposes of providing some structure to the functions provided by the Examiners. That is not to say that the lack of the words "board, commission, department, committee, or agency" when describing the Examiners conclusively establishes that the Examiners are not subject to TOMA. To the contrary, there are no "magic words" that can or should subject a body of individuals to TOMA. However, in the absence of any legislative intent to the contrary, coupled with the fact that the Legislature creates scores of boards, commissions, departments and the like each legislative session that are subject to TOMA (determined only by a facial reading of any such authorizing legislation), one is inevitably left to reasonably conclude that the Legislature only intended the Examiners to examine and report as individuals in a purely advisory capacity outside of the application of TOMA.

This conclusion is only bolstered by the clear language of TEX. ELEC. CODE § 122.036(a) which states in pertinent part that "...the secretary of state shall determine whether the voting system or voting system equipment for which an application has been submitted satisfies the applicable requirements for approval" following the Secretary's review of the Examiner's reports. Quite simply, as to the ultimate decision of whether to certify any particular voting system, the Legislature intended for the buck to stop with the Secretary.

B. Caselaw Considerations

Due to the unique nature of the methodology by which Examiners are appointed and voting systems are certified by the Secretary in Texas, there is a dearth of applicable, binding court precedent. Accordingly, the numerous opinions of the OAG with respect to TOMA are instructive.

C. Attorney General Opinion Considerations

Whether the Examiners could ever be considered to form a "governmental body" for purposes of TOMA is a fact-intensive inquiry; however, given the unambiguous language contained in TEX. ELEC. CODE, Chapter 122, coupled with the foregoing statutory analysis and interpretations of the OAG offered below, it is clear that under Texas law, the Examiners do not appear to qualify as a "governmental body" for purposes of TOMA.

1. Applicable Law

In support of the foregoing, Attorney General Opinion JC-0160, in which OAG examined whether an intergovernmental working group was subject to TOMA, is instructive. OAG concluded that the group was not a governmental body subject to TOMA. OAG relied on several factors, analogous to the situation presented with respect to the Advisory Panel, for such a conclusion. More specifically, the group at issue in Attorney General Opinion JC-0160 was composed of three representatives from Harris County, the City of Houston, and Houston I.S.D. The three entities sought to enter into an interlocal agreement to coordinate tax foreclosure sales. *Id.* at 1. At the time of the opinion request, no member of those governing bodies was sitting on the group; rather the group was made up of governmental employees. The group members had two powers: (a) to object to a foreclosure sale on behalf of the members' employing entity; and (b) to manage properties for which the statutory minimum bid had not been obtained at the tax sale. *Id.* The opinion explains:

Numerous opinions have held that a subcommittee of a governmental body may itself be subject to the Open Meetings Act, even though the subcommittee consists of less than a quorum of the parent body. See, e.g., Tex. Att'y Gen. Op. Nos. JC-0060 (1999); JC-0053 (1999). In the situation you pose, however, no member of one of the three governing bodies is a member of the committee. Furthermore, as the brief points out, it is not "contemplated that the governing bodies will 'ratify' or otherwise act on the actions taken by the committee." See Brief at 1. In Attorney General Opinion JC-0060, we indicated, in effect, that the relevant factors to be considered are: (1) the composition of the subcommittee; (2) its purpose; and (3) the extent to which its recommendations are "rubber-stamped" by the parent body. Tex. Att'y Gen. Op. No. JC-0060 (1999) at 2-3. Neither the composition of the committee, nor its purpose, nor the possibility of "rubber-stamping," nor all together, lead to the conclusion that it is a subcommittee of any of the governmental bodies that compose its membership.

In addition, and without conceding that the Examiners are a "governmental body" for purposes of TOMA, it certainly appears that the closest analogy that can be drawn to the statutory obligations and actual practice of the Examiners is to the line of OAG opinions related to "advisory boards." The paramount issue with respect to "advisory boards" concerns the definition of "meeting" under TOMA. The definition of "meeting" is limited to deliberation concerning "public business or public policy over which the governmental body has supervision or control . . . or [the taking of] formal action . . ." TEX. GOV'T CODE § 551.001(4). Thus, a governmental body must have supervision or control over public business or policy before it is covered by the Act. This provision has been cited by the OAG in finding that the statute does not apply to the proceedings of boards or commissions that are purely advisory in nature.

OAG has determined that there are a variety of advisory boards that are not subject to TOMA. These include: the library board of a city, Op. Tex. Att'y Gen. No. H-467 (1974); the Athletics Council at Texas Tech University, Op. Tex. Att'y Gen. No. H-772 (1976); a committee to study the process used to select chief administrative officers of institutions in the University of Texas system, Op. Tex. Att'y Gen. No. H-994 (1977); a citizen's advisory panel of the Office of Public Utility Counsel, Op. Tex. Att'y Gen. No. JM-331 (1985); and a State Employee Charitable Campaign Advisory Committee, Attorney General Letter Advisory No. 94-064 (1994).

2. Analysis

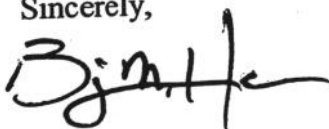
The opinion in Attorney General Opinion JC-0160 is comparable to the instant matter in several particulars. Like the intergovernmental working group, the Examiners are not composed of members of the parent body. The Examiners are employees or designees of one appointed and one elected statewide executive officer. Indeed, it is hard to say that there is a parent body whatsoever; the Examiners simply assist one appointed official with respect to his final determination whether to certify voting systems in Texas. The purpose of the Examiners is to individually examine and individually report to the Secretary. Both of those functions are wholly advisory in nature. Finally, the recommendations of the individual Examiners cannot be "rubber-stamped" because there are only individual advisory recommendations that are each reviewed by the Secretary in connection with his ultimate certification decision. The Examiners do not deliberate collectively and arrive at any recommendation, other than their own individual recommendation. Rather, each individual Examiner drafts advisory reports separately – and submits reports, separately – to the Secretary in order to better inform his decision. As explained above, however, ultimate decision-making authority is vested by statute in the Secretary alone, and the Secretary retains the authority at all times to examine and approve or disapprove of voting systems in the state of Texas. Thus, drawing on the factors enumerated in JC-0060, the Examiners would not meet the definition of "governmental body."

In addition, with respect to the foregoing line of opinions concerning advisory boards, OAG was clear that the determination of whether a particular advisory board was subject to TOMA was a fact intensive inquiry. However, OAG did look to the authorizing resolutions and ordinances of each of the parent bodies to determine the scope of the advisory boards' review of public business or policy. In the instant matter, Examiners are statutorily prohibited from reviewing public business or policy; quite simply, the public business or policy decision (e.g. whether to certify a particular voting system for use in the State of Texas) remains squarely with the Secretary following his review of the reports prepared by the Examiners.

In conclusion, it is clear that there is a balance of interests required between the need for openness and transparency in the examination process and the need to protect (a) the intent of the Legislature with respect to its clear desire not to have the Examiners subject to TOMA, and (b) the voting system vendors' intellectual property rights. SOS represents that it will continue to seek to perfect this balance of interests. However, as a matter of law, the Legislature simply did not intend to make Examiners subject to TOMA. In addition, applicable opinions from OAG clearly indicate that the functions performed by the Examiners cannot, and reasonably should not, be subject to TOMA.

If you have any questions, comments or concerns, or, more generally, if there is anything else that I can do, please feel free to contact me at the address above or at (512) 475-2813.

Sincerely,



Benjamin M. Hanson
General Counsel

Enclosure

cc: Mrs. Kathy Mitchell (*via facsimile* – 512.458-6910, *w/o enclosures*)
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